



INTERIOR BOARD OF INDIAN APPEALS

James Siebol v. Portland Area Director, Bureau of Indian Affairs

29 IBIA 124 (03/15/1996)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JAMES SIEBOL,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 96-16-A
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 15, 1996

This is an appeal from an October 6, 1995, decision of the Portland Area Director, Bureau of Indian Affairs, holding that an appeal from two August 8, 1995, lease cancellation notices was untimely. The notices were issued by the Acting Superintendent, Yakama Agency, BIA, and cancelled appellant's two farming (orchard) leases 1/ on the Yakama Reservation for failure to pay rent. For the reasons discussed below, the Board affirms the Area Director's decision.

Both cancellation notices sent to appellant included the following statement:

This decision may be appealed to the Portland Area Director, Bureau of Indian Affairs, 911 N.E. 11th Avenue, Portland, Oregon 97232-4169, in accordance with the regulations in 25 CFR Part 2 (copy enclosed). Your notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. * * *

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal. [Emphasis in originals.]

Both notices were sent by certified mail and were signed for on August 10, 1995, by Aaron Siebol. Appellant's notice of appeal to the Area Director was dated September 29, 1995. There appears to be no doubt that appellant's notice of appeal was untimely. However, appellant contends, in essence, that his untimely filing should be excused.

1/ These were Lease 1-0-9048, covering Allotment T-1716, and Lease 1-0609, covering Allotment 2337-A.

Appellant's leases provided that annual rental payments were due on December 1 of the year preceding the lease year for which payment was made. When appellant had not paid his 1995 rent by March 9, 1995, the Acting Superintendent sent him a show-cause notice under 25 CFR 162.14, giving him ten days to show why his leases should not be cancelled. For reasons not clear in the record, this notice was not pursued. On June 12, 1995, the Acting Superintendent sent a second show-cause notice. Finally, on August 8, 1995, the Acting Superintendent issued the two cancellation notices at issue here.

Appellant made an attempt to pay the overdue rent on August 25, 1995, by delivering a cashier's check to the Agency. On September 14, 1995, the Superintendent returned the check to appellant, indicating that the reasons for return were that the check did not include interest and that appellant's leases had been cancelled on August 8, 1995.

On appeal to the Board, appellant contends that he did not file a timely notice of appeal because he believed the matter would be resolved if he paid his rent. He believed this, he contends, in part because of his experience in 1994, when he also received a cancellation notice for failure to pay rent on one of his leases. In 1994, he states, he both filed a notice of appeal and paid his rent, whereupon BIA reinstated his lease, rendering his appeal moot.

Appellant also states that, on July 24, 1995, he visited Ernest Clark, who was then, according to appellant, serving as Acting Superintendent. Appellant states that Mr. Clark told him he would have until mid-September to pay his rent (Appellant's Oct. 18, 1995, Declaration at 1; Appellant's Opening Brief at 2-3). Appellant further states that, after he received the cancellation notices, he contacted the Acting Superintendent--again, Mr. Clark--and "was told by Mr. Clark that the notices were merely a formality and that [he] should ignore them" (Declaration at 2). See also Opening Brief at 3. Appellant contends that he had an oral agreement with the Acting Superintendent under which he was not required to pay his rent until mid-September. He contends further that he relied to his detriment on the Acting Superintendent's statements.

The Area Director submits affidavits from Acey Oberly, Jr., who states that he served as Acting Superintendent from December 15, 1994, to August 10, 1995, and Ernest Clark, who states that he served as Acting Superintendent beginning August 21, 1995. Both deny making the statements described by appellant. Both also state that they kept records of meetings and telephone calls and that their records reflect no communications with appellant.

Because Mr. Clark did not become Acting Superintendent until August 21, 1995, it appears likely that appellant misidentified him as the Acting Superintendent, at least on July 24, 1995. 2/ The Area Director argues,

2/ The Board is aware that a BIA employee may sometimes serve in an acting capacity for a short period in the temporary absence of a BIA official. Thus, it is conceivable that, although he did not begin his extended ap-

inter alia, that appellant's misidentification of Mr. Clark as the Acting Superintendent to whom he spoke casts doubt on appellant's credibility in general.

Appellant fails to respond to any of the statements made in the affidavits of Mr. Oberly and Mr. Clark, or to any of the arguments made in the Area Director's answer brief, although he had the opportunity to do so by filing a reply brief. Appellant's credibility was clearly put at issue by the statements of Mr. Oberly and Mr. Clark. In light of appellant's failure to respond to those statements, the Board concludes that the statements made by Mr. Oberly and Mr. Clark are more credible than the statements made by appellant.

The Area Director argues that, even if an Acting Superintendent had agreed to delay the rental payment date, such an agreement would be invalid without the consent of the Indian lessors. Further, he argues, the Acting Superintendent lacked authority to waive the regulations an 25 CFR Part 2, which govern appeals from the decisions of BIA officials.

25 CFR 2.9(a) provides:

The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action * * * . * * * The burden of proof of timely filing is on the appellant. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with § 2.6(b). [3/]

The August 8, 1995, cancellation notices specifically informed appellant of the time limit for filing his notice of appeal and the consequences of failing to comply with the time deadline. Appellant concedes that he received the cancellation notices more than 30 days before he filed his notice of appeal. 4/

fn. 2 (continued)

pointment as Acting Superintendent until later, Mr. Clark was serving as Acting Superintendent on July 24, 1995. Mr. Clark's affidavit does not rule out that possibility.

Appellant does not provide a date for the August conversation which he contends took place.

3/ 25 CFR 2.6(b) provides: "Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."

4/ Appellant contends that the notices were sent to the wrong address. He does not contend, however, that Aaron Siebol lacked authority to sign for certified mail addressed to appellant. In any event, by his own admission, appellant had personally received the notices at least one week before he delivered his check to the Agency on August 25, 1995. See Appellant's Declaration at 2, Opening Brief at 3.

As noted above, appellant seeks to be excused from the timely filing requirement on the basis of his belief that his payment of rent would terminate the cancellation proceedings. If there were ever a case where a misunderstanding of this nature could excuse the untimely filing of a notice of appeal--an extremely unlikely possibility--this is not such a case.

The record shows that appellant was aware by August 29, 1995, that his payment of rent would not resolve the cancellation proceedings. On that date, four days after he delivered his check to the Agency, he called the Agency Realty Officer to inquire about the check. The Realty Officer's contact report for that conversation indicates that he told appellant "that if he disagreed with the cancellation he has the right to appeal our decisions of August 8 and that the 30 day period was due to expire." Thus, even if appellant had earlier believed his rental payment would resolve the matter, he learned otherwise on August 29, 1995. As of that date, he could still have filed a timely notice of appeal.

As stated in 25 CFR 2.9(a), the burden was on appellant to show that he filed a timely notice of appeal. Appellant has failed to do so here.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's October 6, 1995, decision is affirmed. 5/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

5/ Given this disposition, the Board denies the Area Director's motion for bond and order to prune orchards.